Supreme Court, U. S.
FILED
SEP 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-343

IN THE

Supreme Court of the United States

October Term, 1980

GILBERT LEWIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GILBERT B. ABRAMSON
PHILIP L. BLACKMAN
ABRAMSON AND FREEDMAN
1620 Locust Street
Philadelphia, PA 19103

MARK E. KOGAN
KOGAN AND COGAN
1616 Walnut Street, Suite 2200
Philadelphia, PA 19103

Counsel for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

I. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A. Where a conflict of interest may exist because of an attorney's former representation in civil matters of a now immunized witness, does an accused have the right to knowingly and intelligently waive his Sixth Amendment right to the effective assistance of counsel, free of conflicts, and insist upon that attorney as his counsel in a criminal trial.

B. Where an accused's attorney may be in posession of certain communications received by that attorney from a former client, now an immunized government witness, which communications are not regarded as confidential by the highest court of the state in which the transactions occurred, may a federal district court bar that attorney from representing the accused on the basis of the attorney's receipt of those communications.

C. Does an accused's Sixth Amendment right to the assistance of counsel for his defense supersede the rights of a former client of the accused's attorney not to have possible prior confidential communications disclosed at the accused's criminal trial.

II. LIST OF PARTIES

United States of America (Respondent)
Gilbert A. Lewin (Petitioner-Defendant)
Edwin Siegner (Defendant)
Paul Catinella (Defendant)

III. TABLE OF CONTENTS

		Page
I.	Statement of Questions Presented for Review	i
II.	A List of All Parties	ii
III.	Table of Contents	iii
IV.	Table of Authorities	v
V.	Reference to the Official Reports of Any Opinions Delivered in the Courts Below	1
VI.	Jurisdiction	2
VII.	Constitutional Provisions and Other Laws Involved	3
VIII.	Statement of the Case	4
IX.	Argument	8
	A. The Disqualification of the Accused's Attorney by the District Court, and Affirmed by the Third Circuit Court of Appeals, Conflicts With Decisions in the Second, Fourth and Fifth Circuit Courts of Appeals, as Well as Prior Decisions of This Court, and Is in Derogation of the Sixth Amendment's Grant, to the Accused, of a Personal Right to Make Defense, Allowing a Criminal Defendant to Waive the Effective Assistance of an Attorney Free of Conflicts and to Retaining the Counsel of His Choice	8
	B. The Disqualification of the Accused's Attorney by the District Court and Affirmed by the Third Circuit Court of Appeals Based on the District Court's Finding That the Accused's Attorney May Be in Possession of Certain Communications Received by That Attorney From a Former Client, Now an Immunized Government Witness, Conflicts With the Decisions of the Highest Court of the	

III. TABLE OF CONTENTS (Continued)

Page

State in Which the Transactions Occurred Which Hold That Such Communications Are Not Confidential and Would, Therefore, Not Be Grounds for Disqualification of the Accused's Counsel of His Choice 11

C. The District Court and the Court of Appeals for the Third Circuit Utilized a Standard in Determining Whether to Disqualify Counsel Which Conflicts With the Standard Adopted by the Second, Fourth and Fifth Circuit Court of Appeals in That the District Court and the Third Circuit's Standard Fails to Properly Balance the Accused's Sixth Amendment Grant of a Personal Right to Make a Defense and to Retain Counsel of His Choice With the Rights of a Former Client of the Accused's Attorney Not to Have Possible Prior Confidential Communications Disclosed at the Accused's Criminal Trial 16

X. CONCLUSION 19

XI. APPENDIX "A"—Memorandum, Opinion and Order of the United States District Court, Judge Charles R. Weiner Dated May 20, 1980 ..... A1

XII. APPENDIX "B"—Judgment Order of the United States Court of Appeals for the Third Circuit Dated July 9, 1980 ..... A13

XIII. APPENDIX "C"—Order Dated August 4, 1980 of the Court of Appeals for the Third Circuit Denying Petitioner's Petition for Rehearing A15

XIV. APPENDIX "D"—Text of Sixth Amendment of the United States Constitution and Relevant Portions of the Code of Professional Responsibility A16

IV. TABLE OF AUTHORITIES

Cases:

	Page
Cohen v. Jenkintown Cab Co, et al, 375 A. 2d 689 (Pa. Super. 1976)	15
Faretta v. California, 422 U. S. 806, 95 S. Ct. 2525 (1975)	9
Glasser v. U. S., 315 U. S. 60 (1942)	9, 10
Gray v. Estelle, 616 F. 2d 801 (5th Cir. 1980)	10
Illinois v. Allen, 397 U. S. 337	9
Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 (1938)	8, 9
Seifert v. Dumatic Industries, Inc., 197 A. 2d 454 (Pa. Sup. 1964)	14, 15
U. S. v. Armedo-Sarmiento, 524 F. 2d 591 (2nd Cir. 1975)	9, 17
U. S. v. Dolan, 570 F. 2d 1177 (3rd Cir. 1978)	8, 17
U. S. v. Duklewski, 567 F. 2d 255 (4th Cir. 1977)	10, 18
U. S. v. Garcia, 517 F. 2d 272 (5th Cir. 1975)	10, 11
U. S. v. Mahar, 550 F. 2d 1005 (5th Cir. 1975)	10
U. S. v. Provenzano, et al, — F. 2d —, (Slip Opin. 3rd Cir. filed May 8, 1980, Appeal #79-1912)	8, 17

Constitutional Provisions:

Sixth Amendment to the United States Constitution ... i, 3, 8, 9, 10, 11, 16, 17

Statutes:

18 USC § 215	4
18 USC § 371	4
18 USC § 656	4
18 USC § 1014	4
18 USC § 3231	4
28 U. S. C. § 1254(1)	2
28 U. S. C. § 1651	2

Other Authorities:

Code of Professional Responsibility ... 3, 11, 12, 14

V. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED IN THE COURTS BELOW

The opinion and Order of the United States District Court for the Eastern District of Pennsylvania and the Judgment Order of the Court of Appeals for the Third Circuit have, to the best of Petitioner's knowledge, not been published in a national reporter. (Appendix "A" & "B")

VI. JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the Eastern District of Pennsylvania dated May 20, 1980, was entered on July 9, 1980, and both the District Court's Opinion and Order and the Third Circuit's Judgment Order is printed, *infra* (Appendix "A" & "B"). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on August 4, 1980, and is printed, *infra* (Appendix "C"). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) and the All Writs Statute, 28 U. S. C. § 1651.

VII. CONSTITUTIONAL PROVISIONS INVOLVED AND OTHER LAWS INVOLVED HEREIN

United States Constitution:

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Code of Professional Responsibility:

Relevant sections are printed, *infra* (Appendix "D", pp. A16-A19).

VIII. STATEMENT OF THE CASE

This is a petition for Writ of Certiorari to the Third Circuit Court of Appeals following that Court's affirming the Order of the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania, entered on May 20, 1980, granting the Government's Motion to Disqualify Gilbert B. Abramson, Esquire, from representing Petitioner-co-defendant, Gilbert A. Lewin. The issue involving disqualification originally came on to be heard as a Grand Jury matter (E. D. Pa. Misc. No. 78-276), before the Honorable Daniel H. Huyett, III, on March 11, 1980, following the joinder of the issue by the Government's Motion to Disqualify, and the respondent's Answer thereto. While the matter was before Judge Huyett under advisement, on April 22, 1980, indictments were brought down as of Criminal No. 80-147-3, United States District Court for the Eastern District of Pennsylvania against Edwin Siegner, Paul Catinella and petitioner herein, Gilbert A. Lewin, charging each with conspiracy (18 USC § 371) and substantive counts of false statements to banks (18 USC § 1014), misapplication of funds by bank officers (18 USC § 656), and receipt of gifts for processing loans (18 USC § 215), the latter charge applying to Siegner and Catinella in their capacities as officers of the Frankford Trust Company.

Jurisdiction of the District Court was based upon 18 USC § 3231.

The factual background of the case and relationship of the parties, insofar as pertinent, are as follows:

Lewin was an officer and fifty (50%) percent shareholder of the Spiewak-Lewin Construction Company (hereinafter referred to as Spiewak-Lewin), a Pennsylvania corporation engaged in home building. The other fifty (50%) percent shareholder of Spiewak-Lewin was a certain Joseph Spiewak, an unindicted, immunized co-conspirator.

Lewin and Spiewak, along with one Edward Gordon, also an immunized co-conspirator, owned thirty-three and one-third (33⅓%) percent of the shares of Pine Valley Estates, a Pennsylvania corporation which was the owner and developer of certain land upon which new homes were to be built known as "Pine Valley Estates." Those portions of the indictment involving Spiewak-Lewin concern a development known as "Centennial Square Homes." The balance of the indictment involves transactions concerning "Pine Valley Estates."

Essentially, the indictment charges that Lewin ,while an officer of Spiewak-Lewin and Pine Valley Estates, conspired and did submit false information to Frankford Trust Company to cause Frankford Trust to approve loans, lend money, and issue payments to these corporations.

In approximately June of 1973, the law firm of Eilberg, Corson, Getson and Abramson commenced representation of Spiewak-Lewin. In 1976, that same firm formed and commenced representation of Pine Valley Estates. Abramson was a member of that firm during those years, until his withdrawal from the firm in June of 1977. Although Abramson's former law firm was general counsel to these corporate entities, Abramson's contact with Spiewak-Lewin involved exclusively litigation matters. During the course of Mr. Abramson's representation of Spiewak-Lewin, substantially all of his contact was with Mr. Lewin. Abramson's partner, Getson, was in charge of handling the corporate aspects of representation for Spiewak-Lewin and Pine Valley Estates. Abramson had several discussions with Spiewak concerning litigation matters before his departure from his former firm. None of these discussions with Spiewak pertained to the matters which are the subject of this indictment. Abramson never represented Lewin, Spiewak or Gordon in any matter relating to Pine Valley Estates and never represented either Spiewak or Gordon in any personal capacity.

In the hearing before Judge Huyett, Abramson testified at length concerning the Government's other allegations of conflict of interest. Abramson testified he knew of no reason which would prevent him from effectively cross examining any of the Government's potential witnesses, including Spiewak and Gordon. Most significantly, Lewin, present throughout the entire proceedings before Judge Huyett was apprised of all of the ramifications of Abramson's representation of him, and Lewin was persistent in his desire to have Abramson continue to represent him.

The alleged grounds for Abramson's disqualification asserted by the government were: (1) that prior confidential communications between Abramson and Spiewak and/or Gordon might be jeopardized; (2) that Abramson might have personal knowledge of facts pertinent to the case and might be a witness; and (3) that Abramson's alleged animosity toward Allan Getson, his former law partner, resulting from a division of fees disagreement, might interfere with his ability to be effective trial counsel. The district court adopted the positions set forth by the government in its motion to disqualify (Appendix "A", pp. A1-A12).

While petitioner challenges the sufficiency of the record to support any of these findings, we do not raise the sufficiency question in this petition, except insofar as the record fails to support the existence of confidential communication as that term is defined by State law. The absence of an adequate record to support the disqualification of Abramson, however, is made evident in the trial court's opinion and findings on each of the bases for disqualification: With respect to prior confidential communication, the district court said: ". . . *[I]t seems at least possible* that such a conflict will become more apparent as this case moves forward . . ." (emphasis added) (Appendix "A", p. A6); With respect to Abramson's alleged personal

knowledge of personal facts: ". . . While *it is not clear* to us whether or not Abramson actually has such knowledge, the government believes that he does . . ." (emphasis added) (Appendix "A", p. A8); With respect to Abramson's alleged animosity toward Getson: ". . . *We can not be certain* that Abramson's personal interest in the Eilberg firm division of fees suit . . . will affect his representation of Lewin." (emphasis added) (Appendix "A", p. A9). Thus, on all three points, the Court spoke in the subjunctive mood and rendered its decision disqualifying Abramson from representing Lewin on the basis of appearances and possibilities only.

Following a timely appeal to the Third Circuit from the District Court's order of disqualification, the Third Circuit Court of Appeals, on July 9, 1980, entered a judgment order (Appendix "B", pp. A13-A14), without opinion, affirming the decision of the District Court. A petition for rehearing was timely filed with the Third Circuit Court of Appeals and that petition for rehearing was denied on August 4, 1980 (Appendix "C", p. A15). It is from the order of the Third Circuit Court of Appeals of July 9, 1980, affirming the District Court's order of disqualification of counsel to which this petition is addressed.

IX. ARGUMENT

A. The Disqualification of the Accused's Attorney by the District Court, and Affirmed by the Third Circuit Court of Appeals, Conflicts With Decisions in the Second, Fourth and Fifth Circuit Courts of Appeals, as Well as Prior Decisions of This Court, and Is in Derogation of the Sixth Amendment's Grant, to the Accused, of a Personal Right to Make a Defense, Allowing a Criminal Defendant to Waive the Effective Assistance of an Attorney Free of Conflicts and to Retaining the Counsel of His Choice.

In affirming the decision of the District Court in this case, the United States Court of Appeals for the Third Circuit has specifically found that a defendant in a criminal trial does not have the absolute right to knowingly and intelligently waive his Sixth Amendment right to the effective assistance of counsel, free of conflict of interest. The Third Circuit Court of Appeals has previously so ruled in *U. S. v. Provenzano, et al,* — F. 2d — (Opin. filed 5/8/80; Appeal #79-1912). In *U. S. v. Dolan,* 570 F. 2d 1177, 1183 (3rd Cir. 1978), the Third Circuit Court of Appeals similarly found that there was no absolute right to particular counsel where there is an actual conflict of interest despite the defendant's willingness to knowingly and intelligently waive that conflict.

The Second, Fourth and Fifth Circuit Courts of Appeals have rendered decisions diametrically opposed to this view maintained by the Third Circuit Court of Appeals, and we suggest that the Third Circuit's view is contrary to the precepts of the Sixth Amendment and the teachings of the decision of this Court.

This Court has long recognized the right of defendants in criminal cases to knowingly and intelligently waive guarantees afforded them under our Constitution. *Johnson*

v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 (1938); *Glasser v. U. S.*, 315 U. S. 60, 70-71 (1942). In *Faretta v. California*, 422 U. S. 806, 95 S. Ct. 2525 (1975), this Court declared an accused's right to waive his right to the assistance of counsel granted him by the Sixth Amendment, and to proceed pro se in his criminal defense. At the heart of this decision was this Court's finding that:

> ". . . The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." 422 U. S. at 834-835.

This Court declared in *Faretta, supra*, that a defendant's choice to conduct his own defense must be honored even though it worked to his detriment out of " 'that respect for the individual which is the lifeblood of the law', *Illinois v. Allen*, 397 U. S. 337, 350-351 (Brennan, J., concurring)." 422 U. S. at 834. So, too, we suggest that same respect for the individual must afford him the choice of counsel and the right to knowingly and intelligently waive the assistance of conflict-free counsel.

The Second Circuit Court of Appeals has specifically recognized the right of a defendant to knowingly and intelligently waive his Sixth Amendment right to the assistance of counsel free of conflict. In *U. S. v. Armedo-Sarmiento*, 524 F. 2d 591 (2nd Cir. 1975), the Government moved to disqualify counsel because counsel's law firm had previously represented several individuals whom the Government intended to use as witnesses in other criminal cases. At the evidentiary hearing on the Motion to Disqualify, two of the witnesses refused to waive attorney-client privilege with respect to confidential communications made to members of the attorney's disqualified

law firm.[1] The District Court granted the Government's Motion to Disqualify. The Court of Appeals for the Second Circuit, in reversing and reinstating counsel declared:

> "... Of course, a defense counsel's conflict of interest may impair his effectiveness in assisting his client, or in confronting witnesses on behalf of his client. The client, however, may waive his Sixth Amendment rights to effective assistance of counsel and to confrontation of witnesses, just as he may knowingly and intelligently waive any constitutional right." 524 F. 2d at 592.

In *U. S. v. Mahar,* 550 F. 2d 1005 (5th Cir. 1975), the Fifth Circuit reaffirmed its position originally declared in *U. S. v. Garcia,* 517 F. 2d 272 (5th Cir. 1975) that a defendant in a criminal proceeding has the absolute right to voluntarily, knowingly and intelligently waive his right to the effective assistance of counsel free of conflict of interest. The *Mahar* Court declared:

> "... The underlying constitutional standards are clear. A defendant has a right to be represented by fully independent counsel, free of any conflicts of interest posing a risk to the quality of representation. *See, e.g., Glasser v. U. S.,* 315 U. S. 60, 67-76 (1942). Simultaneously, however, the sixth amendment entitles a defendant to waive that right and insist upon retaining an attorney with otherwise disqualifying conflicts." 550 F. 2d at 1007-1008.

See also, *Gray v. Estelle,* 616 F. 2d 801 (5th Cir. 1980).

In *U. S. v. Duklewski,* 567 F. 2d 255 (4th Cir. 1977), the Fourth Circuit Court of Appeals adopted the reasoning

1. In the case at bar, no evidence was offered that either Speiwak or Gordon objected to Abramson's representation of Lewin or that, in fact, confidential communications existed.

of *Garcia, supra,* and held that a defendant has the right to waive his Sixth Amendment right to conflict-free counsel.

In this age of multiple count and multiple defendant indictments and increasing prosecutions involving white collar crime and the increased use of immunized co-conspirators as witnesses by the Government, there arises, more and more, issues concerning conflict of interest. Therefore, it is imperative that this Court resolve the conflict between the Court of Appeals for the Third Circuit and the Second, Fourth and Fifth Circuit Courts of Appeal with regard to an accused's right to waive his Sixth Amendment right to the effective assistance of an attorney free of conflicts. It is crucial that an accused's rights under the United States Constitution not depend upon in which circuit an indictment is brought. The Sixth Amendment must have uniform interpretation throughout the United States of America and the only way that such uniformity can be accomplished is if this Court resolves the conflict in the circuits with regard to this important issue.

B. The Disqualification of the Accused's Attorney by the District Court and Affirmed by the Third Circuit Court of Appeals Based on the District Court's Finding That the Accused's Attorney May Be in Possession of Certain Communications Received by That Attorney From a Former Client, Now an Immunized Government Witness, Conflicts With the Decisions of the Highest Court of the State in Which the Transactions Occurred Which Hold That Such Communications Are Not Confidential and Would, Therefore, Not Be Grounds for Disqualification of the Accused's Counsel of His Choice.

The District Court's memorandum and order which was affirmed by the Third Circuit Court of Appeals bases its disqualification of attorney, Gilbert B. Abramson to a

significant degree on provisions of the Code of Professional Responsibility particularly those sections dealing with attorney-client communications. However, the District Court's opinion flagrantly ignores and without authority to do so in effect overrules decisions of the Pennsylvania Appellate courts which have succinctly explained the applicability of the Code to fact situations such as the instant one and which have indicated which attorney-client communications are "privileged" under said Code provisions. The District Court's action in ignoring the State cases clearly is in derogation of the principle that state law determines the extent and nature of the attorney-client relationship.

Of course, at the outset, it is important to note that it is petitioner's contention that nowhere in the record is there identified a single confidence which might be jeopardized by Abramson's continued representation of Lewin in this case. In this connection, it must be underscored that Abramson had been engaged in this representation for nearly two years in the preindictment status of the case. During this time, no such fear of betrayed confidences were ever voiced by the Government, Getson, or Spiewak and Gordon, all of whom knew of Abramson's representation of Lewin. At the evidentiary hearing before the Honorable Daniel B. Huyett, 3d, Mr. Abramson unequivocally denied the existence of any such communication which might impair his cross-examination of any Government witness.

Moreover, Abramson detailed the nature of his relationship with Spiewak and Gordon as confined to litigation matters of which Spiewak and Lewin had co-extensive and co-existent knowledge. There was nothing known to Spiewak that was not also known to Lewin, and vice versa. In this context, Abramson never represented the corporate officers/shareholders as individuals. The District Court erroneously makes short shrift of this critical distinction,

and was content to note that the "business affairs of the corporation are not easily separated from those of the two individual shareholders." (Appendix "A", p. A6). This may be true with respect to the affairs of the corporate entity, Spiewak-Lewin, it is utterly insupportable outside of this ambit. The essential point is that the affairs of both Spiewak and Gordon in connection with their corporate activities were such that they had no confidences from each other.

In the face of this common sense assessment of this business relationship between Spiewak and Lewin, and in the face of the absence of a scintilla of evidence in the record below which identifies any area in which confidential communications might be jeopardized, the District Court substituted speculation for analysis on the grounds that the latter was simply too difficult. The Court put it this way: ". . . we are disuaded [sic] from any such attempt not merely by the difficulty of such a task, but by the consequences, discussed more fully below, of any failure to properly identify a conflict of interest or confidential communication." (Appendix "A", p. A6). Undoubtedly, the court below was concerned that the only way to establish the existence of either an actual conflict of interest or an endangered confidential communication would involve the disclosure of the communications themselves. This is simply not the case. The Government could have called Spiewak to contradict the testimony of Abramson respecting the nature of their relationship. In this connection, if Spiewak believed that he had disclosed matters to Abramson unknown to Lewin, he could have said so. At the proceedings below, the Government elected not to produce such testimony. The only fair and appropriate inference from this failure is that if called to testify, Spiewak would not contradict Abramson's assess-

ment of their relationship. At a minimum, a negative inference against Lewin should not be drawn.

Even assuming *arguendo* that there are such communications involved in the instant case, under Pennsylvania law these communications are not privileged from disclosure in a situation such as the instant one. In that regard, the Pennsylvania Courts have insisted on facts supporting prejudicial disclosure of confidences in connection with dismissal of counsel. In *Seifert v. Dumatic Industries, Inc., et al,* 197 A. 2d 454 (Pa. Sup. 1964), the Supreme Court of Pennsylvania faced a situation analogous to the one at bar. In *Seifert,* Seifert and Globe, a Pennsylvania corporation, became fifty per cent shareholders in a new corporation, Dumatic. Certain disputes later arose between Globe and Seifert concerning the proper operation of Dumatic. Ultimately, the law firm representing Dumatic filed, on Seifert's behalf, both a stockholders derivative and a direct action alleging breach of fiduciary duty by Globe (the allegation was to the effect that Globe had disclosed trade secrets of Dumatic to its competitors). Globe filed a petition for removal of Seifert's counsel from the case citing conflict of interest and various violations of the Code of Professional Responsibility. The motion was granted by the trial court as to the derivative action.[2] The Supreme Court reversed and reinstated counsel. The Court acknowledged fifty per cent ownership of Dumatic by the parties and chose to rely on the substance of the issues rather than on the formalisms. The Court stated:

> "We are unable to discover any facts in the record which would indicate that Globe would be prejudiced by counsel for Seifert also having been counsel

2. The trial court's order refusing to dismiss counsel from the direct suit was held to be interlocutory and the appeal was quashed.

> for Dumatic, via confidential communications or otherwise. *Any information made available to Seifert through his attorney's representation of Dumatic was equally available to Globe through its appointees on the board of directors of Dumatic.*" 197 A. 2d 454, at 457 (Emphasis added)

Abramson is in the same position here as was counsel in *Seifert, supra.* The parties are likewise in the same position with respect to the corporation, Spiewak-Lewin. Each owns fifty per cent of the stock. Each had equal access to information respecting the operation of the firm. Each had equal entitlement to know the substance of the other's discussions with corporate sounsel.

It must be underscored that Spiewak and Gordon have been immunized. The Government has already protected them far beyond the power of the Canons of Ethics so to do. The Pennsylvania Courts have construed the Canons of Ethics to permit the disclosure of confidential communications, which disclosure does not prejudice the former client's rights. In *Cohen v. Jenkintown Cab Co., et al,* 357 A. 2d 689 (Pa. Super. 1976), the Superior Court stated:

> "Thus, in Pennsylvania, privilege does not bar testimony of an attorney which reveals the substance of a confidential communication, where, in context, the client's rights or interests cannot be adversely affected thereby." (citations omitted). 357 A. 2d 689 at 692.

In the context of this case, Spiewak has no substantial rights which might be prejudiced by Abramson's continued representation of Lewin.

Moreover, Abramson did not even begin to represent Lewin in connection with this matter until after he left

the Eilberg firm in June, 1977. Since that time, he has had utterly no contact with Gordon or Spiewak as clients.[3] In short, the District Court and Third Circuit Court of Appeals ordered Abramson's disqualification not because he was in possession of confidential information which might be compromised, but rather because he had represented the corporation, Spiewak-Lewin, in the past, which is contrary to the state decisions discussed *supra*.

It is crucial that this Court review the District Court's and the Third Circuit's decision on this matter in light of the fact that said federal courts' decisions are diametrically opposed to the decisions of the Pennsylvania Supreme Court and the Pennsylvania Superior Court which we suggest should be binding on the federal court with regard to the state issue of attorney-client privileges.

C. The District Court and the Court of Appeals for the Third Circuit Utilized a Standard in Determining Whether to Disqualify Counsel Which Conflicts With the Standard Adopted by the Second, Fourth and Fifth Circuit Court of Appeals in That the District Court and the Third Circuit's Standard Fails to Properly Balance the Accused's Sixth Amendment Grant of a Personal Right to Make a Defense and to Retain Counsel of His Choice With the Rights of a Former Client of the Accused's Attorney Not to Have Possible Prior Confidential Communications Disclosed at the Accused's Criminal Trial.

In affirming the district court's disqualification of Abramson on the ground that Abramson might be required to disclose confidential communications received

3. As the District Court noted, certain old litigation files have been handled by Abramson on behalf of the corporation against third parties.

from Spiewak and Gordon in order to effectively represent Lewin, ample consideration was not given to the defendant's Sixth Amendment's rights. Essentially, the Third Circuit Court of Appeals has granted the right to the district courts to exercise what the Third Circuit calls the district court's "supervising powers" over the attorneys who practice before it. *U. S. v. Provenzano, supra,* slip op. p. 36. See also *U. S. v. Dolan,* 570 F. 2d 1177 (3 Cir. 1978). The Second Circuit Court of Appeals, again in *U. S. v. Armedo-Sarmiento,* 524 F. 2d 591 (2 Cir. 1975), made clear that conflicts which may exist between an attorney's representation of a criminal defendant and his law firm's previous representation of government witnesses can not compel disqualification of counsel. The Second Circuit Court of Appeals stated:

> "We are mindful of the factors on which the Court below based its decision, including in particular the witnesses' interests in preserving the confidentiality of their privileged communications, but the district court did not give sufficient weight to the appellants' rights . . ." 524 F. 2d at 592.

Apparently, the Third Circuit Court of Appeals applies the same standards for disqualification in criminal cases as it does in civil cases. Cf. *Dolan, supra, Provenzano, supra.* The Second Circuit, we suggest, correctly reasoned that although the Courts have a strong responsibility regarding confidential communications, the controlling factor in the determination of disqualification in criminal cases must be the Sixth Amendment grant to an accused of the assistance of counsel. The *Armedo* Court stated:

> "This Circuit has, in civil cases, frequently stressed the responsibility of the district courts and the bar to

> avoid situations in which attorneys' conflicts of interest may endanger the confidentiality of the clients' privileged communications, as well as cast public doubt on the ethics of the legal profession and the integrity of the judicial process (citation omitted). Because these civil cases do not involve the crucial factor of the criminal defendant's Sixth Amendment rights, however, they are not controlling in the present case." 524 F. 2d at 592-593.

And in a similar situation, the Fourth Circuit in *Duklewski, supra,* overturning the district court's disqualification of counsel on the basis of the ethical aspects of a potential conflict of interest stated:

> ". . . Even though we recognize that the judge was probably prompted by a becoming desire to protect counsel from possible future embarrassment, his action did not give proper regard to the defendant's rights . . ." 567 F. 2d at 257.

We suggest that the question of an attorney's continued representation of an accused despite his former law firm's representation of immunized government witnesses presents an important question requiring a balance of the ethical standards by which attorneys must conduct their professional lives and the accused's right to select the counsel of his choice, and, therefore, is a question which this Court should hear and determine. This is especially true in light of the conflict among the circuits with regard to this very important issue.

X. CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that his Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit be granted and that the lower court's Judgment Order be reversed.

Respectfully submitted,

GILBERT B. ABRAMSON
PHILIP L. BLACKMAN
ABRAMSON AND FREEDMAN
1620 Locust Street
Philadelphia, PA 19103

MARK E. KOGAN
KOGAN AND COGAN
1616 Walnut Street, Suite 2200
Philadelphia, PA 19103

Counsel for Petitioner

XI. APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-00147-01
-02
-03

UNITED STATES OF AMERICA

v.

EDWIN SIEGNER
PAUL CATINELLA
GILBERT LEWIN

Memorandum Opinion and Order.

WEINER, *J.* May 20, 1980

Gilbert Lewin has been indicted by the Grand Jury, charging him with conspiracy to secure loans by the use of false statements, making false statements for the purpose of influencing a bank to approve a loan, and aiding and abetting in violation of 18 U. S. C. §§ 371, 1014, and 2.

Presently before the Court is the Government's Motion to Disqualify Gilbert Abramson, Esq., Lewin's attor-

ney in this case.[1] For the reasons set forth below, the motion is granted.

We begin with a brief summary of the facts.[2] Gilbert Abramson (defendant Lewin's attorney) was formerly a partner in the firm of Eilberg, Corson, Getson and Abramson (Eilberg). In 1973 the Spiewak-Lewin Construction Company (Spiewak-Lewin) became a client of the Eilberg firm. The two principals of Spiewak-Lewin were Gilbert Lewin and Joseph Spiewak, each a 50% shareholder. Lewin is a defendant in this case, and Spiewak is an immunized potential government witness. Beginning in 1974, Abramson began to work directly on matters concerning Spiewak-Lewin, representing the company in all litigation, and only in litigation. In 1976 and 1977, Spiewak individually, Lewin individually, and Edward Gordon organized Pine Valley Estates, Inc. (Pine Valley). Gordon also is an immunized potential government witness. The Eilberg firm represented the Pine Valley principals in the organization of the company and related matters.

In June 1977, Abramson gave notice to the Eilberg firm that he was resigning, and actually left the firm in July of 1977. Both Lewin and Spiewak-Lewin transferred legal business to Abramson after his withdrawal from the firm.

---

1. The Government's Motion to Disqualify Counsel was originally brought prior to the indictment of Gilbert Lewin, and the matter assigned to Judge Huyett. *In Re Grand Jury Proceedings,* Misc. No. 78-276. Evidentiary hearings were held on February 11 and March 11, 1980. Prior to a determination by Judge Huyett, this indictment was handed down by the Grand Jury, and the case assigned to this Court.

2. These facts are based upon the testimony and evidence produced at the hearings of February 11 and March 11, 1980, before Judge Huyett.

Pine Valley was organized to build homes in Philadelphia, with financing to be provided by the Frankford Trust Company (Frankford). Defendants Edwin Siegner and Paul Catinella are, respectively, vice president and clerk of Frankford.

The indictment charges that the three defendants, along with Spiewak and Gordon, engaged in a conspiracy to obtain loans for Pine Valley by concealing from Frankford that Spiewak-Lewin, and Joseph Spiewak and Gilbert Lewin maintained ownership interests in Pine Valley. As a part of this scheme, Lewin allegedly paid a fee to defendants Siegner and Catinella in order to procure these loans. Lewin and the other defendants are further charged with making false statements for the purpose of influencing a bank to approve a loan, in that they allegedly submitted false vouchers for construction expenses, for which the loan would be used as payment.

In its briefs in support of its motion to disqualify Abramson, and in testimony at the hearing before Judge Huyett, the Government alleges that an attempt was made by Lewin to obtain a false bill for legal services from the Eilberg firm in order to justify a false voucher submitted to the bank. It should be noted that a voucher and bill relating to legal expenses incurred from the Eilberg firm are not specifically mentioned in the indictment.

Subsequent to the departure of Abramson and dissolution of the Eilberg firm, a lawsuit was commenced against Abramson concerning the division of the firm's proceeds, including certain fees allegedly collected by Abramson from Lewin in regard to a lawsuit in which Spiewak-Lewin was a party. One of the former law partners in the Eilberg firm involved in the lawsuit against Abramson is Allan Getson. The Government alleges in its briefs that Getson is a potential prosecution witness against Lewin.

The Government contends that Abramson must be disqualified from further representation of Lewin in this case on the grounds of actual or potential conflict of interest, and advances three arguments in support of its motion. The Government argues first that in the representation of Lewin, Abramson may be forced to reveal the confidential communications of Spiewak and Gordon, his former clients and the two potential government witnesses against Lewin. The Government next advances the argument that Abramson has personal knowledge of some of the facts pertinent to this case, and might reasonably be asked to testify by either side. The Government's third argument is that Abramson has a personal interest in the suit by Getson, his former law partner and a potential witness in this case, as to the division of legal fees from Spiewak-Lewin, and that this personal interest, as well as an alleged personal animosity toward Getson, may influence his ability to render legal advice and services to Lewin.

We are guided in our consideration of professional ethical considerations and attorney conflict of interest by the *Code of Professional Responsibility* (Code).

Canon 4 of the Code provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Ethical Consideration 4-5 ("EC 4-5") under Canon 4 provides as follows:

> EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences

and secrets of one client to another, and no employment should be accepted that might require such disclosure.

Disciplinary Rule 4-101(B) was designed to promote EC 4-5.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

There is an inherent conflict in Abramson's prior representation of Spiewak-Lewin, and of Spiewak, and his present representation of Lewin in this criminal case.

In the course of his earlier representation of the company and the individual principals, Abramson was in a position to be privy to many conversations and other information concerning the business affairs of them all. In his testimony at the March 11, 1980 hearing Abramson stated that he had had "hundreds" of conversations with Lewin about the business affairs of Spiewak-Lewin in connection with various litigation matters (Transcript at 77), Abramson further testified that he had also spoken with Spiewak "three or four" times concerning the business affairs of Spiewak-Lewin (Transcript at 73) but that he did not consider these to be confidential communications (Transcript at 74). Abramson stated that Spiewak and

Lewin were shareholders of the Spiewak-Lewin corporation, but that in his opinion, his client was the corporation. He also stated that he did not recollect ever having represented Pine Valley or Gordon although he had once had Gordon as a witness in a case involving Spiewak-Lewin (Transcript at 68).

Despite Abramson's assertions, we cannot accept the characterization of these conversations as non-confidential. Furthermore, we reject Abramson's distinction between the representation of the Spiewak-Lewin corporation and its two individual shareholders, Spiewak and Lewin. We need not engage in a detailed examination of the nature of the attorney-client relationship which exists between an attorney and the shareholders, directors, and officers of a corporation when an attorney represents a corporation. In the situation presented to us here, it is evident that the business affairs of the corporation are not easily separated from those of the two individual shareholders. Moreover, we are disuaded from any such attempt not merely by the difficulty of such a task, but by the consequences, discussed more fully below, of any failure to properly identify a conflict of interest or confidential communication. Although Abramson does not now believe that continued representation of Lewin involves a conflict of interest resulting from his previous representation of Spiewak-Lewin and of Spiewak, and his association with the Eilberg firm while it represented Spiewak, Lewin, Gordon and Pine Valley, it seems at least possible that such a conflict will become more apparent as this case moves forward. Even if not represented directly by Abramson, Gordon and Pine Valley were represented by Abramson's former law firm while Abramson was still associated with the firm. Gordon and Spiewak, as potential witnesses against Lewin, will face cross-examination by Abramson. Effective cross-examination might reasonably be expected to involve the

use of any information and knowledge possessed by Abramson as a result of his prior representation. However, such information, garnered through an attorney-client association, may well prove in fact to be of a confidential nature. Use of such confidences to the disadvantage of the former client or to the advantage of another is clearly unethical under Disciplinary Rule 4-101(B). In furtherance of his professional duty to Lewin, his present client, Abramson would therefore be forced to reveal such confidences as he may be privy to, thereby violating the mandate of the Code of Professional Responsibility as to the protection of the attorney-client relationship with his former client. Under such circumstances, Abramson should be disqualified from further representation of Lewin in this case.

Canon 5 of the Code provides: "A Lawyer Should Exercise Professional Judgment on Behalf of a Client. Under Canon 5, Ethical Consideration 5-9 provides:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Disciplinary Rule 5-101 provides:

Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on or behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Abramson must also be disqualified on the basis of the government's assertion that he has some personal knowledge of matters relevant to the indictment and alleged use of false vouchers by defendant Lewin. While it is not clear to us whether or not Abramson actually has such knowledge, the government believes that he does, so that he is a potential witness against Lewin. In addition, if Abramson has personal knowledge, it is entirely possible that a different defense counsel might wish to call Abramson to testify on Lewin's behalf. Abramson's continued representation of Lewin would preclude any such testimony as a defense witness, possibly to the detriment of his client. Moreover, although Abramson does not believe that he has personal knowledge related to this case, or that he would be called as a government witness, his independent professional judgment may be clouded by his, and his client's, desire that he continue as counsel

here. A different attorney would be in a better position to assess the existence and extent of any personal knowledge which Abramson may have, and whether he would be of any benefit to Lewin as a defense witness. Disqualification will therefore better serve Lewin's interests and the interest of justice by removing any conflict.

Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment On Behalf of a Client." Pursuant to this Canon, Ethical Consideration 5-2 states:

> Interests of a Lawyer That May Affect His Judgment.
>
> A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.

Disciplinary Rule 5-101 provides:

> Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
>
> (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

We cannot be certain that Abramson's personal interest in the Eilberg firm division of fees suit, in which he and Getson are adversaries will affect his representation of Lewin. The likelihood of such a conflict is obvious, however, with regard to the cross-examination of Getson, who the government has indicated is a potential prosecution witness. Abramson's allegedly strong animosity toward Getson with respect to their personal dispute could affect Abramson's independent professional judgment with

regard to the defense of Lewin, particularly since the Eilberg firm suit involves fee payments by Spiewak-Lewin. As was the case with respect to any personal knowledge of Abramson, a different attorney will be able to represent Lewin without any conflict.

We are strengthened in our determination that Abramson be disqualified by our consideration of the dangers presented by the continued representation of Lewin by Abramson even if Spiewak, Gordon and Getson do not testify against Lewin, or Abramson does not cross examine them. Indeed, regardless of whether the case comes to trial, or Spiewak, Gordon or Getson testify, or Abramson cross examines them, or whether Lewin pleads guilty without a trial, any final judgment of guilt would remain forever open to challenge by the defendant on grounds of ineffective assistance of counsel. Whether or not such a claim by the defendant would have any merit at all, the mere existence of that possibility, so likely in a case such as this, fosters a climate of uncertainty unfair to the government, and most importantly, to the defendant. In addition, the effectiveness of, and confidence of the people in the criminal justice system is not enhanced by such doubts. Moreover, sanction of continued representation by attorneys in situations such as this raises the specter of deliberate abuse by defendants and their attorneys, who may seek to avoid disqualification in cases of conflict of interest in the hope of later seeking reversal of a conviction or withdrawal of a guilty plea.[3]

We are not unmindful of Lewin's choice of Abramson as his attorney, and of Abramson's testimony that he has explained to Lewin the possible ramifications of his continued representation of him, and that Lewin nevertheless wants Abramson to represent him. (Transcript at 77-78). We reject any suggestion by Abramson that Lewin has thereby "waived" any con-

3. Of course, we make no intimation whatsoever of any such intent by those involved in this case.

flict of interest in regard to further representation by Abramson. Although such a waiver of effective assistance of counsel may be made by a defendant, it is obvious that Lewin may not make any waiver of a conflict of interest with respect to third parties. Thus, any disclosure by Abramson of any confidential communications of Spiewak or Gordon must be agreed to by Spiewak and Gordon even if Lewin "waives" Abramson's conflict as regards him (Lewin).[4]

This exercise of the court's supervisory powers to disqualify attorney Abramson does not abrogate defendant Lewin's Sixth Amendment rights. The Sixth Amendment guarantees each defendant the "assistance of counsel for his defense." This guarantee "contemplates that such assistance be untrammeled and unimpaired", *Glasser v. United States,* 315 U. S. 60, 70 (1942). Nevertheless, "although the right to counsel is absolute, there is no right to a particular counsel". *United States v. Dolan,* 570 F. 2d 1177, 1181 (3d Cir. 1978). "Certainly the sixth amendment should not be interpreted to allow a defendant to sanction a lawyer's breach of ethical duties, when such duties serve the public interest as well as the client's." *Id.* at 1183. "When a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant". *Id.* at 1184.

We therefore grant the motion of the government to disqualify Abramson.

---

4. The standards established for such a waiver and procedures to be followed by the court are set forth in *United States v. Dolan,* 570 F. 2d 1177, 1181 (3d Cir. 1978). No inquiry has been made of the defendant Lewin as to whether the waiver standards have been met here. We need not do so in view of the fact that Lewin may not make a waiver on behalf of Spiewak or Gordon.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 80-00147-01
02
03

UNITED STATES OF AMERICA

v.

EDWIN SIEGNER
PAUL CATINELLA
GILBERT LEWIN

Order.

The motion of the United States to disqualify Gilbert Abramson, attorney for defendant, Gilbert Lewin, is GRANTED.

Defendant, Gilbert Lewin is to appear with his new counsel for arraignment on Wednesday, May 28, 1980, at 9:15 a.m. in Courtroom 6B, United States Courthouse, 6th and Market Streets, Philadelphia, Pennsylvania.

All other defendants and their counsel are to appear before the Court at that time.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
Charles R. Weiner

XII. APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1808 and 80-1823

UNITED STATES OF AMERICA

v.

GILBERT LEWIN,
Appellant in No. 80-1808

GILBERT B. ABRAMSON, ESQUIRE,
Appellant in No. 80-1823

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Crim. No. 80-00147-03)

Argued July 7, 1980
Before: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges.

Mark E. Kogan, Esquire
1616 Walnut Street
Suite 2200
Philadelphia, PA 19103
Attorney for Appellants.

Peter F. Vaira
United States Attorney

Walter S. Batty, Jr.,
Assistant U. S. Attorney

Daniel B. Huyett
Assistant U. S. Attorney

3310 United States
Courthouse
601 Market Street
Philadelphia, PA 19106
Attorneys for Appellee.

Judgment Order.

After considering the contentions raised by appellants, to-wit,

(1) That the district court erred in disqualifying Abramson as counsel on the bases of his former representation of a corporation of which a now immunized government witness was a shareholder, officer and director;

(2) That the district court's conclusion that Abramson is a potential witness in the trial below is entirely unsupported by the record;

(3) That the district court's conclusion that Abramson should be disqualified because of alleged personal animosity toward a former law partner is entirely unsupported by the record,

it is

ADJUDGED AND ORDERED that the order of the district court be and is hereby affirmed.

By THE COURT,

/s/ JOSEPH F. WEIS, JR.
Joseph F. Weis, Jr.
Circuit Judge

Attest:
/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*

DATED: July 9, 1980

XIII. APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1808 & 80-1823
UNITED STATES OF AMERICA

v.

GILBERT LEWIN, and
GILBERT B. ABRAMSON, Esq.

Appellants

Sur Petition for Rehearing.

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WEIS
Weis
Judge

Dated: August 4, 1980

XIV. APPENDIX "D"

UNITED STATES CONSTITUTION

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CODE OF PROFESSIONAL RESPONSIBILITY

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client.

* * *

ETHICAL CONSIDERATIONS

* * *

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care

should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

* * *

DISCIPLINARY RULES

DR 4-101 Preservations of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client, including his identity.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

* * *

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or

assuming a position that would tend to make his judgment less protective of the interests of his client.

* * *

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

* * *

DISCIPLINARY RULES

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called

as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

No. 80-343

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1980

GILBERT LEWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN J. ROSENBERG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-343

GILBERT LEWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court violated petitioner's Sixth Amendment right to the assistance of counsel by disqualifying his trial counsel.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Abraham v. *United States*, 549 F.2d 236	15
Armstrong v. *McAlpin*, 625 F.2d 433, cert. pending, No. 80-431 (filed Sept. 18, 1980)	5
Benjamin, In re, 582 F.2d 121	5
Cohen v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A.2d 689	11
Community Broadcasting of Boston, Inc. v. *FCC*, 546 F.2d 1023	5
Continental Investment Corp., In re, No. 80-1362 (1st Cir. Oct. 31, 1980)	5
Coopers & Lybrand v. *Livesay*, 437 U.S. 463	5
Cuyler v. *Sullivan*, No. 78-1832 (May 12, 1980)	8, 15
Davis v. *United States*, 411 U.S. 233	7
Faretta v. *California*, 422 U.S. 806	5, 7, 15
Funds of Funds, Ltd. v. *Arthur Andersen & Co.*, 567 F.2d 225	13
Gas-A-Tron v. *Union Oil Co.*, 534 F.2d 1322, cert. denied, 429 U.S. 861	12
Hickman v. *Taylor*, 329 U.S. 495	14
Kaplan v. *Bombard*, 573 F.2d 708	15
Leis v. *Flynt*, 439 U.S. 438	7
Melamed v. *ITT Continental Baking Co.*, 592 F.2d 290	5
Multi-Piece Rim Products Liability Litigation, In re, Firestone Tire & Rubber Co. v. *Risjord*, 612 F.2d 377, cert. granted, No. 79-1420 (May 12, 1980) (argued Nov. 12, 1980)	5

PREVIOUS PAGE WAS BLANK

Cases—Continued

	Page
Musicus v. *Westinghouse Electric Co.*, 621 F.2d 742	13
Novo Terapeutisk Laboratorium v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186	12
Seifert v. *Dumatic Industries, Inc.*, 413 Pa. 395, 197 A.2d 454	11
Silver Chrysler Plymouth, Inc. v. *Chrysler Motors Corp.*, 518 F.2d 751	12
Singer v. *United States*, 380 U.S. 24	6-7
Trone v. *Smith*, 621 F.2d 994	13
United States v. *Armedo-Sarmiento*, 524 F.2d 591	15
United States v. *Birdman*, 602 F.2d 547, cert. denied, 444 U.S. 1032	14
United States v. *Burton*, 584 F.2d 485, cert. denied, 439 U.S. 1069	10, 15
United States v. *Dinitz*, 538 F.2d 1214, on remand from 424 U.S. 600	7, 16
United States v. *Dolan*, 570 F.2d 1177	7, 9
United States v. *Duklewski*, 567 F.2d 255	15
United States v. *Garcia*, 517 F.2d 272	15, 16
United States v. *Kitchin*, 592 F.2d 900, cert. denied, 444 U.S. 843	16
United States v. *Mahar*, 550 F.2d 1005	15
United States v. *Nobles*, 422 U.S. 225	14
United States v. *Partin*, 601 F.2d 1000, cert. denied, No. 79-646 (May 27, 1980)	12
United States v. *Payner*, No. 78-1729 (June 23, 1980)	9
United States v. *Salinas*, 618 F.2d 1092	16
United States v. *Vargas-Martinez*, 569 F.2d 1102	12, 15
Westinghouse Electric Corp. v. *Gulf Oil Corp.*, 588 F.2d 221	13

Constitution, statutes and rule:

United States Constitution, Sixth Amendment	6, 7, 8, 9, 10, 14, 15, 16
18 U.S.C. 215	1
18 U.S.C. 371	1
18 U.S.C. 656	1
18 U.S.C. 1014	1

Constitution, statutes and rule—Continued Page

28 U.S.C. 1291 5
Proposed Fed. R. Crim. P. 44(c) 9, 10, 11, 15

Miscellaneous:

ABA Code of Professional Responsibility (1978):

DR 4-101(A) and (B) 11
DR 4-101 (C) 12
DR 5-102 14
DR 5-105 ..... 8, 12
EC 5-15 8

ABA Standards Relating to the Administration of Justice, The Defense Function (1974) 8
Advisory Committee Note to proposed Rule 44(c), Fed. R. Crim. P. 9

OPINIONS BELOW

The order of the court of appeals (Pet. App. A13-A14) and the opinion of the district court (Pet. App. A1-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1980. A petition for rehearing was denied on August 4, 1980 (Pet. App. A15). The petition for a writ of certiorari was filed on September 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 22, 1980, a federal grand jury in the Eastern District of Pennsylvania filed an indictment charging petitioner and two co-defendants with participating in a fraudulent scheme to obtain bank loans, in violation of 18 U.S.C. 371, 1014, 656 and 215. Prior to trial, the government moved to disqualify petitioner's trial attorney, Gilbert Abramson.[1] Following a hearing, the district court granted the motion to disqualify (Pet. App. A1-A12). The court of appeals affirmed by judgment order (Pet. App. A13-A14).

---

[1] The government had previously moved to disqualify Abramson in the course of the grand jury proceedings in this case. Evidentiary hearings on that motion were held before the district court on February 11 and March 11, 1980. Before the court rendered a decision on that motion, however, the grand jury indicted petitioner and his two co-defendants.

1. The pertinent facts, as found by the district court, may be summarized briefly. In 1973, the Spiewak-Lewin Construction Company, a business organization of which petitioner and Joseph Spiewak were each principal officers and 50% shareholders, became a client of the law firm of Eilberg, Corson, Getson and Abramson. Gilbert Abramson represented Spiewak-Lewin in litigation matters; Allan Getson, his partner, handled the Company's corporate affairs (Tr. 8-9).[2] In 1976 and 1977, petitioner, along with Spiewak and one Edward Gordon, organized Pine Valley Estates, Inc., a real estate enterprise formed to build homes in the Philadelphia area (Tr. 9-10). The Eilberg firm was retained to represent the principals of Pine Valley in organizational and related corporate matters. During this period of time, Abramson spoke with petitioner on many occasions concerning litigation matters affecting Spiewak-Lewin. Abramson also discussed the company's business with Spiewak on several occasions (Tr. 70-77).

In mid-1977, Abramson severed his relationship with the Eilberg firm. Lewin withdrew as a client of the firm and took his legal business as well as various Spiewak-Lewin matters to Abramson. Following Abramson's departure from the firm, his former firm filed suit against him to settle a dispute regarding the proper division of legal fees generated by, *inter alia*, the previous Spiewak-Lewin representation (Tr. 10-13).

The present indictment centers around certain activities of the three organizers of the Pine Valley enterprise and two employees of the Frankford Trust Company. The defendants are charged with making

---

[2] Transcript references are to the hearing of March 11, 1980.

a fraudulent attempt to secure loans for Pine Valley from Frankford. The indictment alleges that petitioner and his Pine Valley partners, Spiewak and Gordon, conspired with two bank employees to obtain the loans by concealing certain crucial information from the bank. As a part of the overall plan, petitioner allegedly paid unlawful fees to the bank employees for their cooperation. In addition, petitioner submitted false vouchers for construction expenses to the bank in an effort to justify inflated loan requests. The government expects to prove at trial, for example, that petitioner attempted to obtain a false bill for legal services from the Eilberg firm in order to justify one of the false vouchers submitted to the bank (Tr. 14-17).

Only petitioner and the two bank employees were named as defendants in the indictment. Spiewak and Gordon received grants of immunity, and the government expects to call both as prosecution witnesses at trial (Tr. 17). The government also expects to call Getson, Abramson's former law partner in the Eilberg firm, as a prosecution witness.

2. In light of these facts, the district court concluded that Abramson could not properly continue to represent petitioner in the criminal case. First, the court found (Pet. App. A4-A7) that Abramson's past representation of Spiewak-Lewin,[3] together with his former firm's representation of Spiewak, Lewin, Gordon and Pine Valley, made it probable that confidential communications would be revealed in any properly vigorous cross-examination of immunized

[3] The court concluded (Pet. App. A6) that Abramson's representation of the Spiewak-Lewin corporation could not easily be separated from the affairs of its two 50% shareholders.

government witnesses Spiewak and Gordon. The court next found (Pet. App. A7-A9) that Abramson's alleged personal knowledge of the details of various incidents relevant to matters charged in the indictment created a possibility that he might be called as a witness either for the defense or for the government. Finally, the court concluded (Pet. App. A9-A10) that Abramson's personal interest in the outcome of the related fees dispute with his former partner Getson and his alleged personal animosity towards his former colleague might affect his independent judgment in representing petitioner, particularly with regard to the possible cross-examination of Getson, a likely prosecution witness. After considering these factors,[4] the district court disqualified Abramson from representing petitioner at trial.

ARGUMENT

Petitioner contends that the district court's disqualification order contravenes what he terms (Pet. 8) his "absolute" right to proceed at trial with counsel of his choice.[5] As explained below, however, a

---

[4] The district court also noted (Pet. App. A10) that a failure on its part to act at this juncture would create the possibility that any future final judgment would be subject to attack on grounds of ineffective assistance of counsel. The court further stated (*ibid.*) that disqualification was required so that the "confidence of the people in the criminal justice system" would not be eroded, and to avoid the potential for deliberate abuse inhering in such situations, whereby "defendants and their attorneys * * * may seek to avoid disqualification in cases of conflict of interest in the hope of later seeking reversal of a conviction or withdrawal of a guilty plea."

[5] There may be some question whether the order granting the motion to disqualify petitioner's counsel is a collateral

defendant's selection of a lawyer to represent him is subject to reasonable restrictions respecting the lawyer's qualifications and compliance with applicable ethical standards. Moreover, there is no indication here that the present and former clients of petitioner's lawyer and his law firm whose interests may conflict with those of petitioner have consented to Abramson's representation of petitioner. Therefore, even if several consenting clients have a right to be repre-

---

order appealable under 28 U.S.C. 1291. The issue whether an order *denying* disqualification is appealable has divided the circuits and is now before the Court in *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (argued Nov. 12, 1980). The courts of appeals that have held orders denying disqualification not to be appealable have not yet taken issue with the appealability of orders *granting* disqualification. See, *e.g.*, *Armstrong* v. *McAlpin*, 625 F.2d 433, 440-441 (2d Cir. 1980) (en banc), cert. pending, No. 80-431 (filed Sept. 18, 1980); *In re Multi-Piece Rim Products Liability Litigation, Firestone Tire & Rubber Co.* v. *Risjord*, 612 F.2d 377, 378 (8th Cir. 1980) (en banc), cert. granted, No. 79-1420 (May 12, 1980); cf. *In re Continental Investment Corp.*, No. 80-1362 (1st Cir. Oct. 31, 1980), slip op. 12; *Melamed* v. *ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc.* v. *FCC*, 546 F.2d 1023, 1028 n.41 (D.C. Cir. 1976); but see *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978) (order disqualifying counsel representing grand jury witness not immediately appealable; witness must refuse to testify because he was deprived of counsel and seek review of contempt citation). Nonetheless, it could be argued that a defendant's claim that the district court erred in disqualifying his attorney could adequately be reviewed on an appeal from a final judgment of conviction and therefore would not satisfy the third criterion of the collateral order doctrine. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). We did not raise the issue of appealability in the court of appeals, however, and the Court need not consider it here if it agrees with our contention that the case does not otherwise warrant review.

sented by the same lawyer despite their conflicting interests, this case would not warrant review by the Court. Moreover, aside from the possible conflict of interest in this case, the district court found it possible that petitioner's lawyer would be called as a witness at trial. This furnishes an independent basis for disqualification of an attorney.

1. Petitioner first relies (Pet. 9) on this Court's decision in *Faretta* v. *California*, 422 U.S. 806 (1975), where the Court held that the Sixth Amendment guarantees a criminal defendant the right to conduct his own defense, without the assistance of an attorney. Petitioner argues that the *Faretta* decision suggests that the Sixth Amendment also grants to a defendant who chooses to be assisted by counsel the right to proceed with any attorney he selects, no matter what conflicts of interest or other ethical problems may result from that chosen representation. This argument misreads the nature of the right recognized in *Faretta*.

The decision in *Faretta* is not premised on the existence of a Sixth Amendment right to waive the assistance of counsel, from which a court might infer the companion right petitioner asserts in this case—the right to waive the *effective* assistance of counsel and thereby to insist on an attorney who has a conflict of interest. To the contrary, the Court emphasized in *Faretta* that the right to self-representation could *not* be inferred mechanically from the fact that a defendant possesses the ability to waive his right to the assistance of counsel. 422 U.S. at 820 n.15. As the Court observed, "'[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.'" *Id.* at 819 n.15, quoting *Singer* v. *United States*, 380

U.S. 24, 34-35 (1965). Accordingly, although a defendant who knowingly and intelligently consents to joint representation after being fully apprised of the potential for a conflict of interest may later be held to have waived his right to the effective assistance of counsel (even though it turns out that a conflict of interest developed), it does not follow that a defendant has a *right*, in advance of trial, to insist on a lawyer who is burdened with a conflict of interest.

The right to appear personally, recognized in *Faretta*, is an independent right guaranteed by the Sixth Amendment, which generally confers on the defendant, not his attorney, the right to make a defense. 422 U.S. at 819; see *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978). One of the means available to the defendant in making his defense is to invoke the assistance of counsel. When a defendant chooses to be represented by counsel, however, he necessarily does so subject to reasonable standards governing the qualifications and conduct of counsel (*United States* v. *Dinitz*, 424 U.S. 600 (1976)), including ethical standards necessary to preserve the fairness and integrity of the administration of justice and the appearance of such fairness and integrity. This is but a particular application of the general rule that the trial of criminal cases may properly be subject to reasonable rules of procedure, including those affecting the invocation of constitutional rights. Cf. *Davis* v. *United States*, 411 U.S. 233 (1973). For example, it scarcely could be contended that a defendant has an absolute constitutional right to be represented by a lay person, a disbarred lawyer, or even a lawyer licensed in another jurisdiction. Cf. *Leis* v. *Flynt*, 439 U.S. 438 (1979). Nor, we think, may he insist on being defended by

a lawyer who is a co-defendant or a charged co-conspirator in the case. Although these may seem to be extreme examples, they underscore the fallacy in petitioner's assertion of an absolute right to counsel of his choice.

Thus, although a court should not lightly interfere with a defendant's selection of a particular lawyer to represent him, the Sixth Amendment permits reasonable regulation of the practice of law designed to ensure that those appearing as officers of the court possess the necessary qualifications and familiarity with local procedures and to prevent against conflicts of interest or other ethical violations. It must be remembered that conflicts of interest affect more than the individual lawyer's immediate client. There is a compelling *public* interest in ensuring that attorneys who appear as officers of the court and participate in the administration of the criminal justice system are not burdened with conflicting loyalties to the clients they represent. In furtherance of this public interest, established ethical norms for attorneys provide that a lawyer should not represent several clients in the same case unless all consent *and* it is "obvious" or "clear" that the attorney can adequately represent the interests of each. *ABA Code of Professional Responsibility* DR 5-105, EC 5-15 (1978), cited in *Cuyler* v. *Sullivan*, No. 78-1832 (May 12, 1980), slip op. 11 n.11; *ABA Standards Relating to the Administration of Justice, The Defense Function* § 3.5(b) (App. Draft 1971).

These established ethical standards presuppose that there will be situations in which it would be improper, because of a conflict of interest, for a lawyer to represent several defendants, even if they consent to that representation. If the lawyer none-

theless proceeds with the multiple representation in the face of a clear conflict of interest, he would be subject to disciplinary action by the bar or the court. And yet, under petitioner's notion of an absolute Sixth Amendment right to counsel of one's choice, the trial court would be unable to exercise its supervisory power over members of the bar appearing before it (see *United States* v. *Payner*, No. 78-1729 (June 23, 1980), slip op. 7-8 n.7) by disqualifying the lawyer. We cannot believe that the Sixth Amendment requires the trial court to stand by while the integrity of the bar and the administration of justice are so seriously undermined.

As the Advisory Committee Note accompanying proposed Fed. R. Crim. P. 44(c) states, quoting *United States* v. *Dolan*, *supra*, 570 F.2d at 1184:

> [W]hen a trial court finds an actual conflict of interest * * *, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation.

Moreover, proposed Rule 44(c) provides, with respect to joint representation, that unless there is good cause to believe that no conflict of interest is likely to arise, "the court shall take such measures as may be appropriate to protect each defendant's

right to counsel." The Advisory Committee Note makes clear, in the passage just quoted, that under the proposed rule the court could disqualify counsel in appropriate circumstances even though the defendants have consented to joint representation. Therefore, in promulgating proposed Rule 44(c), this Court appears implicitly to have rejected petitioner's argument that there is an absolute Sixth Amendment right to counsel of one's choice, irrespective of conflicts of interest. Cf. *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

2. In the present case, attorney Abramson is not confronted with a possible conflict of interest resulting from joint representation of several defendants, the situation to which proposed Rule 44(c) is specifically addressed. Instead, the conflict arises because of the prior representation by Abramson and his law firm of two companies owned by petitioner together with prosecution witnesses, and their representation of petitioner and the witnesses individually However, much the same potential for a conflict of interest arises in this setting as where the same lawyer simultaneously represents two defendants. Thus, in the present case, in order to respect the confidentiality of information obtained in the course of representing the prosecution witness and to maintain his duty of loyalty to that witness with respect to matters relating to the earlier representation, the lawyer may be forced to limit his cross-examination of the witness to the detriment of the defendant.[6] There is no indi-

[6] Petitioner contends (Pet. 12-16) that the trial court erred in finding a conflict of interest in this setting because, as a matter of Pennsylvania law, any communications Abramson may have had with Spiewak would not be privileged from

cation that the former clients of Abramson and his firm—Spiewak, Gordon, Spiewak-Lewin, and Pine

---

disclosure; he suggests that disqualification of Abramson in order to prevent him from exploiting these communications was therefore inappropriate. This argument fails for several reasons.

First, a federal district court, in exercising its supervisory power over attorneys appearing before it, is not bound by the provisions of state law, particularly in federal criminal prosecutions, for which procedural uniformity is essential. Cf. proposed Fed. R. Crim. P. 44(c), *supra*.

Second, the state cases relied upon by petitioner would not support his position, even if applicable. *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 357 A.2d 689 (1976), concerned the scope of the evidentiary privilege for attorney-client communications. However, the scope of this *evidentiary* privilege from *compelled* disclosure is narrower than the attorney's duty not to disclose or exploit confidential information *voluntarily* to his own advantage or that of another client. See DR 4-101(A) and (B). In *Jenkintown Cab*, moreover, the court found that it was impossible that the attorney's testimony would affect the client's interests, because the client was dead and his heirs could suffer no injury, the testimony would not affect the client's reputation, the substance of the testimony had already been revealed in a prior deposition, and disclosure was necessary to prevent an unjust result in the litigation. Clearly, no similar considerations are present in the instant case.

The second case upon which petitioner relies, *Seifert* v. *Dumatic Industries, Inc.*, 413 Pa. 395, 197 A.2d 454 (1964), involved a motion to disqualify counsel in "unique circumstances" where there existed "no possibility of a conflict of interest." 413 Pa. at 399, 197 A.2d at 456. The court, while generally reaffirming the sanctity of confidential attorney-client communications (413 Pa. at 398 n.2; 197 A.2d at 455 n.2), simply found, on the facts presented, no risk of improper disclosure. 413 Pa. at 400-401 n.7; 197 A.2d at 457 n.7. *Seifert* thus hardly stands for the proposition that a later court is prohibited under Pennsylvania law from determining, on the facts before it, that a real threat to client confidences does in fact exist.

Valley Estates—affirmatively waived their right to maintain the confidentiality of whatever information may have been imparted to Abramson or his partners or that they waived the lawyer's duty of loyalty with respect to matters involved in the previous representation. DR 4-101(C), DR 5-105. Under these circumstances, the district court did not abuse its discretion in disqualifying Abramson. *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); compare *United States* v. *Partin*, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied, No. 79-646 (May 27, 1980).[7]

---

[7] Petitioner suggests (Pet. 13) that the district court erred in disqualifying Abramson because the government did not prove precisely what information had been imparted to Abramson in the course of the prior representation. Petitioner misconceives the applicable rules in this area. First, disqualification does not turn solely on what information Spiewak gave directly to Abramson, as petitioner seems to believe (Pet. 12-13). Other members of the Eilberg firm represented Pine Valley and its principals, including Spiewak and Gordon, while Abramson was a member of the law firm (Pet. App. A6). There is a presumption that all members of the law firm, including Abramson, were privy to information obtained by any one of them. *Novo Terapeutisk Laboratorium* v. *Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 196-197 (7th Cir. 1979) (en banc); *Gas-A-Tron* v. *Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.), cert. denied, 429 U.S. 861 (1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975). Thus, Abramson may properly be charged with possession of confidential information given to his associates by Spiewak and Gordon, unless the court affirmatively finds an absence of communication with him respecting these confidences.

Second, in order to require disqualification of an attorney in a case such as this, it is only necessary to show a "substantial relationship" between the lawyer's (or his firm's) earlier representation and the matter in which his disquali-

Of course, quite aside from the problems posed by Abramson's and the firm's earlier representation of government witnesses and affected corporations, the district court also concluded that Abramson should be disqualified because of the government's assertion that he has personal knowledge about some matters relevant to the indictment, including an attempt to obtain false vouchers for legal services purportedly performed by the Eilberg firm, which were used to obtain a larger loan from the Frankford Trust Company. As a result, it is possible that Abramson would be called as a witness by either the prosecution or the defense. As the district court noted (Pet. App. A7-A8), an attorney ordinarily is expected to withdraw

---

fication is sought, such that there is a reasonable possibility that he may be able to utilize confidential information obtained in the course of the earlier representation to the detriment of the former client. See, *e.g.*, *Musicus* v. *Westinghouse Electric Co.*, 621 F.2d 742 (5th Cir. 1980); *Trone* v. *Smith*, 621 F.2d 994 (9th Cir. 1980); *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977). To require more—*i.e.*, a showing of what confidences actually were disclosed—would expose the very attorney-client confidences that it is the purpose of the disqualification rule to protect. See, *e.g.*, *Trone* v. *Smith*, *supra*; *Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978). Here, there would seem to be the requisite "substantial relationship" between Abramson's and his law firm's representation of Spiewak-Lewin, Pine Valley, and their principals on the one hand, and the criminal charges against petitioner on the other. In these circumstances, a searching inquiry into the nature of the confidential information imparted to Abramson and other members of the Eilberg firm on behalf of the two corporations and their principals is unnecessary. And, at least in the absence of an affirmative showing of a waiver of disqualification by the corporations and their principals, disqualification of Abramson would appear to be in order.

if he may become a witness in the case. DR 5-102; cf. *United States* v. *Nobles*, 422 U.S. 225, 252-253 (1975) (White, J., concurring); *Hickman* v. *Taylor*, 329 U.S. 495, 517 (1947) (Jackson, J., concurring); *United States* v. *Birdman*, 602 F.2d 547, 552-553 & n.14 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), and cases cited. Because the rule against a lawyer's being a witness in his own case is well recognized, its application to the facts of this case does not warrant review by the Court.

Finally, the court concluded that disqualification was warranted because Abramson was involved in a dispute over division of legal fees (derived in part from work for Spiewak-Lewin) with Getson, his former partner and a prosecution witness. The district court found (Pet. App. A9-A10) that this dispute might affect Abramson's independent judgment on behalf of petitioner. We have some doubt about this ground for disqualification, standing alone, in view of the somewhat speculative nature of the suggested effect on Abramson and the deference that ordinarily should be shown to a defendant's choice of counsel. The fee dispute becomes more significant, however, because it in part concerns fees for representation of Spiewak-Lewin. This underscores the degree to which Abramson, through his former law firm, is personally enmeshed in matters relating to prosecution witnesses and corporations involved in this criminal case. Viewed in this light, the fees dispute, when coupled with the other factors, reinforces the district court's order of disqualification.

3. Petitioner argues, however, that the decision below conflicts with decisions of several other courts of appeals holding that a defendant has a Sixth Amendment right to proceed with counsel who has a

conflict of interest. In *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975), for example, the court held, relying on *Faretta* v. *California*, *supra*, that a defendant has a Sixth Amendment right to insist upon an attorney with otherwise disqualifying conflicts if he waives his right to effective assistance of counsel. See also *United States* v. *Mahar*, 550 F.2d 1005, 1007-1008 (5th Cir. 1977). The Fourth Circuit suggested its agreement with *Garcia* in *United States* v. *Duklewski*, 567 F.2d 255 (1977), without further analysis. The Second Circuit reached a similar result in *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (1975), also relying principally on *Faretta* and *Garcia*, with little additional analysis. See also *Kaplan* v. *Bombard*, 573 F.2d 708, 714 (2d Cir. 1978). But see *Abraham* v. *United States*, 549 F.2d 236, 239 (2d Cir. 1977) ("defendants are not entitled to joint representation as a matter of right"); *United States* v. *Vargas-Martinez*, *supra*; *United States* v. *Burton*, *supra*.

The asserted conflict with these cases does not warrant review by this Court.[8] This is not merely a

---

[8] As we have explained (see pages 6-10, *supra*), the decisions upon which petitioner relies are in error to the extent they interpret the Sixth Amendment and this Court's decision in *Faretta* to prohibit a court from disqualifying a lawyer where there is a substantial risk that the lawyer would have an actual conflict of interest. If these courts persist in their view after proposed Fed. R. Crim. P. 44(c) goes into affect, and despite this Court's observations in *Cuyler* v. *Sullivan*, *supra*, slip op. 11 n.11, regarding the ethical problems inherent in multiple representation, review by this Court might be warranted in an appropriate case at a later date. But review of the present case is not warranted for the reasons given in the text.

situation of a possible conflict of interest among several clients, as in the cases upon which petitioner relies. The district court also found that disqualification was appropriate because Abramson might be called as a witness. This furnishes an independent ground for disqualification designed to protect the integrity of the judicial system, without regard to any conflict of interest. The Fifth Circuit, notwithstanding its *Garcia* decision dealing with joint representation, has held that the Sixth Amendment does not prohibit disqualification where necessary to ensure "the fair and orderly administration of justice." *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir. 1980); see also *United States* v. *Kitchin*, 592 F.2d 900, 903 (5th Cir.), cert. denied, 444 U.S. 843 (1979); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir.) (en hanc), on remand from 424 U.S. 600 (1976). There is no reason to believe that the Second and Fourth Circuits would not agree with the Fifth Circuit that disqualification may be appropriate where it is ordered for reasons that are independent of the attorney's relationship with his clients. Thus, it does not appear that the instant case, in which disqualification was ordered in substantial part to ensure the integrity of the judicial process by preventing the possibility that defense counsel might be called as a witness, would have been decided differently by any other circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN J. ROSENBERG
Attorney

NOVEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333537 164